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CONSTITUTIONAL DECISIONS BY A BARE MAJORITY OF THE COURT.

IN December, 1823, the legislature of Kentucky, in a blaze of resentment against a decision of the Supreme Court of the United States invalidating a Kentucky statute,¹ petitioned Congress "so to organize the Supreme Court of the United States that no constitutional question * * * involving the validity of State laws, shall be decided by said Court unless two-thirds of all the members belonging to said court shall concur in such decision."² At the same time a United States senator from Kentucky was demanding that Congress require for such decisions the concurrence of seven judges out of a Supreme Court of ten.³ Last year (1920) a former attorney-general of the state of Michigan declared, "I am certain that if a law were passed by which a two-thirds vote of the entire membership of the Court would be required before an Act of Congress could be declared void, it would be a lasting benefit and for the good of all."⁴ During the span of nearly a hundred years which separates

¹ *Green v. Biddle*, 8 Wheat. 1 (1823), holding unconstitutional Kentucky statutes of 1797 and 1812 which protected squatter holdings. This decision, intrinsically unpopular, was rendered more so by the widespread belief that the decision was rendered by only three judges, or a minority of the court of seven. This belief seems to have been erroneous. For discussions of this situation see BEVERIDGE, *LIFE OF JOHN MARSHALL*, IV, 375-382; CORWIN, *JOHN MARSHALL AND THE CONSTITUTION*, 184-185; Charles Warren, "Legislative and Judicial Attacks on the Supreme Court," 47 AMER. L. REV. 20-27.

² ACTS OF KENTUCKY, 1823. This resolution was passed Dec. 29, 1823. Portions of it are printed in AMES, *STATE DOCUMENTS ON FEDERAL RELATIONS*, 107.

³ ANNALS OF CONG., 18th Cong., 1st Sess. 28. See BEVERIDGE, *op. cit.*, IV, 379.

⁴ Fred A. Maynard, "Five to Four Decisions of the Supreme Court of the United States," 54 AMER. LAW REV. 512.

these expressions of opinion there has been every now and again fresh expression of the same belief that the Supreme Court ought not to be able to declare legislative acts unconstitutional by a bare majority of the court.⁵

In general there have been two main grounds upon which five-to-four decisions of the Supreme Court upon questions of constitutional law have been attacked. In the first place, it is urged that when the Supreme Court invalidates a statute by such a narrow margin it violates one of the most firmly established doctrines of constitutional construction—the doctrine of reasonable doubt; a doctrine which holds that an act of the legislature must be presumed by the courts to be constitutional until its unconstitutionality is demonstrated beyond all reasonable doubt, and that all reasonable doubts regarding the constitutionality of a law will be resolved in favor of the law. Many eminent jurists and constitutional lawyers⁶ are in accord with the view which Watson has clearly stated in the following words:

“Can it be said that an act is a *clear violation* of the Constitution when five justices declare it to be so, and four declare with equal emphasis that it is clearly not so? All doubt must be resolved in favor of the constitutionality of the law, and it must be clear in the mind of the court that the law is unconstitutional. But can this condition exist when four of the justices are equally earnest, equally emphatic, equally persistent and equally contentious in their position that a law is clearly constitutional?”⁷

There are others who criticize these bare majority decisions upon the broader grounds of expediency and policy; these believe that it would serve the public interest to require that the Supreme Court may invalidate a statute only by a unanimous decision or by some specified extraordinary majority. There are, of course, many writers who criticize majority decisions upon both of these grounds, but it should be recognized at the outset that the “reasonable doubt” argument and the argument from expediency are quite different and have no necessary connection with each other. It is the purpose of

⁵ These proposals are summarized, *infra*, p. 795.

⁶ *Infra*, p. 783.

⁷ WATSON ON CONSTITUTION, II, 1190, note.

this paper to discuss majority decisions in some detail from the standpoint of each of these two criticisms.

I. MAJORITY DECISIONS AND THE DOCTRINE OF REASONABLE DOUBT

The question whether a five-to-four decision declaring a statute unconstitutional must be regarded as a repudiation of the doctrine that all reasonable doubts regarding the validity of a law must be resolved in favor of the law is not a question which can be disposed of in the glib and casual manner in which many writers have dealt with it. The pungent allusion in one of our weekly journals to "the oft recurring scandal of five members of the Supreme Court solemnly adjudging that the other four hold opinions which no reasonable man can entertain,"⁸ carries with it a certain smack of plausibility, but inquiring minds should not be too ready to accept such self-satisfied criticisms at their face value. Whether or not a five-to-four decision invalidating a law violates the doctrine of reasonable doubt depends upon what the doctrine of reasonable doubt really is. To determine this it becomes necessary to make sure, not what writers and critics think the doctrine means, or think it ought to mean, but the precise meaning attached to it by the courts which have created and applied it. Some discussion, therefore, of the origin, basis, and nature of the doctrine of reasonable doubt as a canon of judicial construction becomes pertinent.

1. *The Origin and Early Development of the Doctrine of Reasonable Doubt.* One or two interesting facts may be noted regarding the early history of the doctrine of reasonable doubt. Seven years before the Supreme Court officially announced in *Marbury v. Madison*⁹ that it possessed the power to declare acts of Congress unconstitutional, Justice Samuel Chase declared in *Hylton v. United States*¹⁰ that "if the court have such power, I am free to declare, that I will never exercise it, but in a very clear case." But in the first case in which the Supreme Court actually invalidated an act

⁸ *The New Republic*, July 30, 1917, Vol. XI, 410.

⁹ 1 Cranch 137 (1803).

¹⁰ 3 Dall. 171, 175 (1796). See also the following statement made two years later by Mr. Justice Iredell: "If any act of Congress, or of the legislature of a state, violates those constitutional provisions, it is unquestionably void, though, I admit, that as the authority to declare it void is of a delicate and awful nature, the court will never resort to that authority, but in a clear and urgent case." *Calder v. Bull*, 3 Dall. 386, 399 (1798).

of Congress there is not the slightest allusion to any presumption that the law was valid or that any reasonable doubt could possibly exist as to its invalidity.¹¹ Even in spite of the strong presumptions which might have been raised in favor of the statute and the strong doubts as to the correctness of Marshall's view of its invalidity¹² there is no evidence that he felt the slightest compunction in overruling an act of a coordinate branch of the government. In fact, a careful reading of *Marbury v. Madison* leaves one with the distinct impression that Marshall regarded the unconstitutionality of a statute as an objective and visible characteristic as to the existence or non-existence of which there could be no question. The process of discovering such unconstitutionality is as simple as the task of a child sorting black and white pieces of cardboard—some are black, some are white, but it is perfectly easy to tell which is which and the awkward question of where to classify gray pieces is conveniently side-stepped.¹³ It will also be noted in this connection that nowhere in the two long chapters which Story devotes in his commentaries to the problem of constitutional interpretation by the courts does he allude to the doctrine of reasonable doubt or deviate in any substantial way from Marshall's viewpoint in *Marbury v. Madison*.¹⁴ It is true, furthermore, that in none of the first six cases in which the Supreme Court declared acts of Congress uncon-

¹¹ Marshall in the course of his opinion in *Marbury v. Madison* does refer to the "peculiar delicacy of this case." (1 Cranch 154). There is no evidence, however, that he had in mind anything but the turbulent political events out of which the litigation had arisen.

¹² Seldom have stronger presumptions of validity surrounded a statute. Ellsworth, Marshall's predecessor as Chief Justice, had drafted the act while a member of the first Congress. Not less than twelve members of the Convention of 1787 had either worked for or voted for the act while in Congress. In two earlier cases the Supreme Court had assumed the jurisdiction which Marshall now finds Congress could not constitutionally confer. *United States v. Lawrence*, 3 Dall. 42 (1795); *United States v. Peters*, 3 Dall. 121 (1795). The theory that the statute was unconstitutional seems to have been Marshall's own personal invention. See BEVERIDGE, *op. cit.*, III, 127-129. For a strong argument tending to show that the statute should have been upheld see CORWIN, *THE DOCTRINE OF JUDICIAL REVIEW*, Ch. I.

¹³ This seems to have been characteristic of Marshall's mental processes. "His invariable quest," says Corwin, "was for the axiomatic, for absolute principles," JOHN MARSHALL AND THE CONSTITUTION, 123.

¹⁴ [3rd Ed.], Bk. III, Ch. IV, V.

stitutional did the court say any thing about reasonable doubt.¹⁵

Of course merely because a statute is invalidated without anything being said about this doctrine it does not follow that the court did not apply the principles of it in reaching its decision. It is certainly true that the doctrine came to be recognized at a very early date as a sound rule of judicial construction. Marshall himself gave a somewhat qualified statement of the doctrine in the case of *Fletcher v. Peck*, in 1810, in which he declared:¹⁶

“The question whether a law be void for its repugnancy to the Constitution, is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station, could it be unmindful of the solemn obligations which that station imposes. But it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its Acts to be considered as void. The opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other.”

In deciding the case of *Green v. Biddle*, in 1823, Mr. Justice Washington sought to allay the storm of protest which it has already been seen¹⁷ greeted that decision, by solemnly declaring that the Court had attached every possible weight to the presumption that the state statute in question was constitutional. He said:

“We hold ourselves answerable to God, our consciences and our country to decide this question according to the dictates of our best judgment, be the consequences of the decision what they may. If we have ventured to entertain a wish as to the result of the investigation which we have laboriously given to the case, it was that it might be favorable to the val-

¹⁵ In addition to *Marbury v. Madison*, *supra*, these cases were: *Dred Scott v. Sandford*, 19 How. 393 (1856); *Gordon v. United States*, 2 Wall. 561 (1864); *Ex parte Garland*, 4 Wall. 333 (1866); *Reichert v. Felps*, 6 Wall. 160 (1867); *The Alicia*, 7 Wall. 571 (1868). Mr. Justice Miller refers to the doctrine in his dissent in the *Garland* case, but the case of *Hepburn v. Griswold*, 8 Wall. 603 (1869), is the first in which the opinion of the majority discusses the doctrine.

¹⁶ 6 Cranch 87 (1810).

¹⁷ *Supra*, note 1.

idity of the laws; our feeling being always on that side of the question unless the objections to them are fairly and clearly made out."¹⁸

Four years later the same justice speaking for the court in the case of *Ogden v. Saunders* gave utterance to what has been regarded very generally as the classic statement of the doctrine of reasonable doubt. After remarking that the question of the validity of the statute under review was a doubtful one he went on to say:

"If I could rest my opinion in favor of the constitutionality of the law * * * on no other ground than this doubt, so felt and acknowledged, that alone would, in my estimation, be a satisfactory vindication of it. It is but a decent respect due to the * * * legislative body by which any law is passed, to presume in favor of its validity, until its violation of the Constitution is proved beyond all reasonable doubt. This has always been the language of this court when that subject has called for its decision, and I know it expresses the honest sentiments of each and every member of this bench."¹⁹

The unanimity with which the doctrine of reasonable doubt has come to be accepted as the only correct and orthodox rule of judicial construction is attested by subsequent judicial utterances numbering into the thousands²⁰ as well as by the statements of practically every commentator in the field of constitutional law. Needless to say it is a doctrine which has also been adhered to by state courts in passing upon the validity of state and federal statutes.

It is highly important to keep in mind that this doctrine is not one which has been imposed upon the courts by the Constitution or by statutes. It is merely a rule or canon of construction which the courts have with virtual unanimity imposed upon themselves.²¹ It is a sort of judicial "self-denying ordinance."²²

¹⁸ 8 Wheat. 1, 93 (1823).

¹⁹ 12 Wheat. 213, 270 (1827).

²⁰ Persons with a passion for statistics will find ample data upon this point compiled in the *Century* and *American Digests*.

²¹ "These rules are self-established, under a sense of propriety and expediency, and are not created by any constitutional necessity." WILLOUGHBY ON CONSTITUTION, I, 12. See also BLACK ON INTERPRETATION OF LAW, 7.

²² The judicial origin of the rule is emphasized by the fact that in the following groups of cases the presumption of constitutionality does not at-

2. *The Theoretical Basis for the Doctrine of Reasonable Doubt.* Naturally a doctrine which has so firmly embedded itself in our judicial traditions rests upon several theoretical and practical grounds which may be briefly commented upon.

tach to a statute. (1) "If the question at issue as to whether a given power resides in the Federal Government or in the States, the fact that a state legislature in its enactment has asserted that it is vested in the states, is no presumption in favor of the validity of this decision. The Supreme Court in passing finally upon this point is not, then, called upon to review the act of a coordinate department, but has to decide between the conflicting claims of two governments, and quite properly feels itself at liberty to decide the point as an original proposition; namely, upon the basis of its own judgment as to what the most reasonable construction of the constitutional provisions involved." WILLOUGHBY ON CONSTITUTION, I, 22. This is undoubtedly sound theory, but it may be questioned whether in practice the Supreme Court has proceeded on the theory that such state laws as these need not be presumed to be valid. Note the language of the court, for instance, in *Gibbons v. Ogden*, 9 Wheat. 1, 186; *Brown v. Maryland*, 12 Wheat. 419, 436. (2) In spite of the weight of authority to the contrary, there are certain jurisdictions in which in the interests of justice the courts have felt obliged to recognize that one statute may be void "on its face" while another may not, in determining whether a public officer is entitled to protection for torts or crimes committed in the enforcement of an unconstitutional statute. In these jurisdictions he is protected only if the act was invalid "on its face." *Anheuser-Busch Brewing Assoc. v. Hammond*, 93 Ia. 520 (1895); *Henke v. McCord*, 55 Ia. 378 (1880); *Lang v. Bayonne*, 74 N. J. L. 455 (1906); *Sessums v. Botts*, 34 Tex. 335 (1870); *Shafford v. Brown*, 49 Wash. 307 (1908); *State v. McNally*, 34 Me. 210 (1852), *dictum*. See also THAYER, *LEGAL ESSAYS*, 25-26. (3) There are also cases in which the courts have actually presumed statutes to be void unless their validity could be positively established. "Where it is proposed by a statute to deny, modify or diminish a right or immunity secured to the people by an explicit constitutional provision, the presumption is against the validity of the statute." *Salter v. State*, 2 Okla. Cr. 464, 479 (1909). See also *Covington C. L. Turnpike Co. v. Sanford*, 164 U. S. 578, 595 (1896). The clearest illustration of this is to be found in the early attitude of the courts toward police legislation, particularly protective labor legislation. During the eighties the doctrine of "liberty of contract" as one of the ingredients of the due process of law guarantee began to be applied by the courts. The practical effect was to create a *prima facie* case against the validity of any social or labor legislation which impinged upon this liberty of contract. The burden was placed on the proponents of such laws to establish their constitutionality by positive proof. See Pound, "Liberty of Contract," 18 *YALE L. JOUR.* 454; Freund, "Constitutional Limitations and Labor Legislation," 4 *ILL. LAW REV.* 609; Kales, "New Methods in Due-Process Cases," 12 *AMER. POL. SCI. REV.* 241,

In the first place, it must be recognized that in a very large number of cases there is ample room for an honest and intelligent difference of opinion with reference to the meaning and application of constitutional provisions. Some constitutional clauses are ambiguous, and no man or body of men can justly say that their construction of them is the only correct one. Other constitutional provisions are so broad and general in their terms that their application to concrete situations may open up questions which, as Dean James P. Hall says, "depend upon the interpretation of complex social and economic facts, where reasonable men may disagree widely in their conclusions."²³ This situation arises most frequently, perhaps, in the effort to settle the vexed question at what point laws passed in the exercise of the police power of the state begin to violate the guarantee of due process of law in the Fourteenth Amendment. As Mr. Justice Holmes has aptly expressed it, "We have few scientifically certain criteria of legislation, and it is often difficult to mark the line where what is called the police power of the states is limited by the Constitution of the United States."²⁴ It may, then, be concluded that one reason why the courts feel that they must assume that the legislature is right in its solution of a constitutional question is that it is often so difficult to prove conclusively that any one view of the question is clearly wrong.

In the second place, the presumption that Congress has not exceeded its constitutional powers in enacting a statute is grounded upon what Mr. Justice Strong in *Knox v. Lee* termed "a decent respect for a coordinate branch of the Federal Government."²⁵ It was said in the *Sinking Fund Cases*:²⁶

and numerous cases cited in these articles. Decisions embodying this doctrine were severely criticised and in recent years the courts are usually refusing to recognize any prima facie invalidity in a police statute merely because it restricts liberty of contract. See for example *Erie R. R. Co. v. Williams*, 233 U. S. 685 (1914); *State v. Bunting*, 71 Ore. 259 (1914). (4) "By weight of authority, when part of it [statute] has been declared unconstitutional, the presumption in favor of constitutionality will not be indulged in as to the remaining portion." 12 CORPUS JURIS, 800 and cases cited.

²³ HALL, CONSTITUTIONAL LAW, 36-37.

²⁴ *Noble State Bank v. Haskell*, 219 U. S. 104, 110 (1911).

²⁵ 12 Wall. 457, 531 (1872). See also the passage from *Ogden v. Saunders* quoted above, page 776.

²⁶ 99 U. S. 700, 718 (1878).

"Every possible presumption is in favor of the validity of the statute and this continues until the contrary is shown beyond all rational doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule."

This whole point is most clearly summarized by Professor Willoughby in a paragraph which may well be quoted in full:²⁷

"The fact that Congress has given a particular construction to a constitutional provision, is of very great weight with the Supreme Court when it is called upon to examine the correctness of this interpretation. This is due to the fact that the court is dealing with the act of a separate and independent department of government which the Constitution intends to be, so far as possible, coordinate in power with the executive and judicial departments; that is, coordinate in the sense that, like them, when acting within the limits of the power constitutionally granted, it shall be independent of control by the others.

"From necessity the Constitution must have intended that the legislative and executive departments should have the power, in the first instance at least, of determining the extent of the powers constitutionally granted to them, and that, therefore, the judiciary should not substitute its judgment for theirs except in cases where there is no doubt that the action which has been taken is not constitutionally warranted."

In short, the presumption that a congressional act is constitutional may be said to rest upon a sort of interdepartmental comity.

This "decent respect" for a coordinate branch of the government is substantially heightened by the fact that all members of the legislature take a solemn oath to support the Constitution and to act in accordance with its provisions. They assume under such an oath the responsibility of considering with care the constitutionality of every law which they pass and they are under an obligation to refrain from passing a law if they entertain honest doubts as to its validity. At least this is the orthodox judicial view of the duties imposed on

²⁷ WILLOUGHBY, I, 20. See also COOLEY, *CONSTITUTIONAL LIMITATIONS*, 227; MCCLAIN, *CONSTITUTIONAL LAW IN THE UNITED STATES*, 21; TUCKER, *CONSTITUTION OF THE UNITED STATES*, I, 376.

the lawmaker by his oath of office;²⁸ whether there is any evidence that he actually does take his responsibilities in respect to constitutional questions with equal solemnity is, of course, a very different matter.²⁹ But certainly the courts can hardly do less than to assume that the members of the legislature will respect the oath of office which they all take; and to assume this must, of course, raise the presumption that the laws enacted are only such as the lawmaking body regards, after careful deliberation, as being of unquestionable constitutionality.

3. *What Is a "Reasonable Doubt?"* If we are to determine whether a five-to-four decision of the Supreme Court violates the doctrine of reasonable doubt, the question naturally arises, when is a doubt to be regarded as reasonable. Without claiming to have examined every one of the multitude of judicial answers which have been given to this question the writer believes that they will all be found to fall into three general classes. In the first place, there are numerous cases in which the courts have set up what may be called the "reasonable man" test,—the rule that no act should be held invalid so

²⁸ This has been put most clearly by Cooley, who says: "They [the legislature] legislate under the solemnity of an official oath, which it is not to be supposed they will disregard. It must, therefore, be supposed that their own doubts of the constitutionality of their action have been deliberately solved in its favor, so that the courts may, with some confidence repose upon their conclusion, as one based upon their best judgment. For although it is plain, upon the authorities, that the courts should sustain legislative action when not clearly satisfied of its invalidity, it is equally plain in reason that the legislature should abstain from adopting such action if not fully assured of their authority to do so. Respect for the instrument under which they exercise their power should impel the legislature in every case to solve their doubts in its favor, and it is only because we are to presume they do so, that the courts are warranted in giving weight in any case to their decision. If it were understood that legislators refrained from exercising their judgment, or that, in cases of doubt, they allowed themselves to lean in favor of the action they desired to accomplish, the foundation for the cases we have cited would be altogether taken away." *CONSTITUTIONAL LIMITATIONS*, 254.

²⁹ It is generally understood and frequently lamented that legislative bodies are continually passing laws the constitutionality of which they regard as doubtful, for the express purpose of getting a judicial decision upon the question of the validity of such statutes. See the recent case of *Evans v. Gore*, 253 U. S. —; 64 L. Ed. 598 (1920), in which the Supreme Court said, "Moreover, it appears that, when this taxing provision was adopted, Congress regarded it as of uncertain constitutionality, and both contemplated and intended that the question should be settled by us in a case like this." See also THAYER, *LEGAL ESSAYS*, 24.

long as any reasonable or intelligent man could entertain any doubts as to its invalidity. Two of the many statements of this rule will suffice. In an early Georgia case it is declared:³⁰

"This violation of a constitutional right ought to be as obvious to the comprehension of every one as an axiomatic truth, as that the parts are equal to the whole."

In a South Carolina decision the court says:³¹

"The validity of the law ought not then to be questioned unless it is so obviously repugnant to the constitution that when pointed out by the judges, all men of sense and reflection in the community may perceive the repugnancy."

In the second place, many courts have made use of the analogy between the presumption of innocence to which a person accused of crime is entitled and the presumption of constitutionality which arises in favor of a statute; and have suggested that the reasonable doubt which when felt by a jury in deciding the guilt or innocence of the accused must lead to his acquittal is the same reasonable doubt in nature and degree which should lead a court to uphold the constitutionality of a statute. In other words, a court must be precisely as ready to pronounce a law valid in a doubtful case as a jury is to acquit in a doubtful case.³²

In the third place, it will be found that the vast majority of judges make no effort to find synonyms for the expression "reasonable doubt" or to set up any definite standards by which it is to be measured. Or else they content themselves with making the somewhat obvious statement that by a "reasonable doubt" is meant a rational doubt. In fact, their point of view in the matter would probably be accurately expressed in the following words of a judge of the supreme court of Ohio:³³

³⁰ *Grimball v. Ross*, Charlton's Reports, 175 (1808). See THAYER, *op. cit.*, 18.

³¹ *Adm'rs of Byrne v. Adm'rs of Stewart*, 3 Des. 466 (1812). See Kales, "New Methods in Due Process of Law," 12 AMER. POL. SCI. REV. 243; THAYER, *op. cit.*, 19.

³² "The lawmaking power of the state is entitled to at least as strong a presumption in favor of the validity of its acts as a criminal on trial in favor of his innocence." *Gilbert v. Green*, 185 Ky. 817, 828 (1919).

³³ Dissenting opinion of Davis, C. J., in *State ex rel. Weinberger v. Miller*, 87 Oh. St. 27, 53 (1912).

"The phrase "reasonable doubt" has been the subject of much analysis and many refined distinctions, especially in criminal cases, but it seems to be incapable of satisfactory definition, probably because it defines itself; for a reasonable doubt is, after all that has been said, a doubt that is reasonable, and until definite limits can be found for the word "reasonable" the phrase cannot be made any clearer by definition. For practical purposes it is easier to say what is not a reasonable doubt than to frame an all inclusive definition of the phrase, and it is generally agreed that a merely speculative or captious doubt raised to avoid a disagreeable conclusion is not a reasonable doubt."

It seems on the whole very probable that in the three classes of cases just discussed the courts have all been trying to say the same thing, and that in spite of their diversity of expression they have applied the very same doctrine in the very same way: that the test of the actual existence of and reasonableness of any doubt in the judicial mind as to the constitutionality of a statute is a test which the court itself must apply accordingly to its own intellectual processes. It is a subjective and not an objective test; the reasonable doubt, if there is any, must exist in the mind of the court.

Keeping in mind the facts which have been brought out with respect to the origin, basis and nature of the doctrine of reasonable doubt, we are now prepared to approach the alleged repudiation of that doctrine by five-to-four decisions upon questions of constitutionality.

4. *The Argument That Five-to-Four Decisions Invalidating Statutes Violate the Doctrine of Reasonable Doubt.* The argument that a majority decision declaring a statute unconstitutional is utterly inconsistent with the doctrine of reasonable doubt has been briefly alluded to at the outset of this paper³⁴ and need not be greatly elaborated here. That argument proceeds somewhat along the following lines: Five judges believe that a statute is unconstitutional; four judges believe it to be constitutional. Therefore the question of its constitutionality is a doubtful question. That this doubt as to the constitutionality of the statute is a "reasonable doubt" must of course be admitted unless one is to impugn the wisdom of the four dissenting justices. Now the doctrine of reasonable doubt demands

³⁴ *Supra*, p. 772.

that the Supreme Court shall presume every act of Congress to be constitutional and shall continue to act upon that presumption until the unconstitutionality of the statute has been demonstrated beyond a reasonable doubt. And yet in the face of a reasonable doubt upon that question, a doubt evidenced by the fact that four of their colleagues equally learned with themselves disagree with them, a bare majority of the court presumes to pass final judgment that the act is void. It must be quite obvious that such a decision is a virtual repudiation of the reasonable doubt rule of construction. The substance of this argument has been advanced by many distinguished jurists and scholars, among whom may be mentioned Judge Baldwin,³⁵ Professor Goodnow,³⁶ Mr. W. F. Dodd,³⁷ Mr. C. W. Collins,³⁸ and Mr. Watson, whose statement of it was quoted above.³⁹

³⁵ "It has been judicially asserted that it [inconsistency of statute with Constitution] must be plain beyond a reasonable doubt, thus applying a rule of evidence which governs the disposition of a criminal cause. As judgments declaring a statute inconsistent are often rendered by a divided court, this position seems practically untenable. The majority must concede that there is a reasonable doubt whether the statute may not be consistent with the Constitution, since some of their associates either must have such a doubt, or go further and hold that there is no inconsistency between the two documents." *THE AMERICAN JUDICIARY*, 103.

³⁶ "Finally, it is possible * * * to provide that no court shall decide an act of a legislative body to be unconstitutional, unless the decision is reached by a unanimous action of the members of the court or by the action of any majority that might be determined upon. * * * Such a provision would also really bring it about that our practice would accord with our theory, which is that in order that an act of the legislature be declared void by a court its unconstitutionality, like the guilt of a person charged with crime, must be clear beyond a reasonable doubt." *SOCIAL REFORM AND THE CONSTITUTION*, 352.

³⁷ "The principle that a statute must not be declared invalid unless its inconsistency with the constitution is clear and beyond reasonable doubt has, as Judge Baldwin suggests, become untenable, because such decisions are frequently rendered by a divided court, whose dissenting members must be presumed to have a reasonable doubt regarding the question of constitutionality. In fact, it may be said to be true that practically all important decisions declaring statutes unconstitutional are now rendered by divided courts." "The Growth of Judicial Power," 24 *POL. SCI. QUART.* 193.

³⁸ "Surely then a law is not clearly and manifestly unconstitutional when one or more of the members of the Court itself have serious doubts as to the question." *THE FOURTEENTH AMENDMENT AND THE STATES*, 169.

³⁹ *Supra*, p. 772.

While the conclusiveness of the chain of reasoning just outlined has usually been regarded by its authors as entirely self-evident, it has frequently been felt that additional strength is lent to this view by the fact that all the members of a petit jury must agree upon the guilt of the accused in order to overcome beyond reasonable doubt the presumption of his innocence. A person accused of crime is presumed to be innocent until his guilt has been demonstrated beyond all reasonable doubt, and his guilt is held not to be demonstrated beyond all reasonable doubt so long as a single juror either believes him innocent or entertains reasonable doubts as to his guilt. The strictness with which this rule of unanimity in jury verdicts has been adhered to for centuries demonstrates how ridiculous it is to say that a statute has been proved invalid beyond reasonable doubt when four out of nine judges believe the statute to be constitutional.⁴⁰

It now remains to analyze and appraise these very plausible arguments and present what may be said in reply.

5. *The Argument That Five-to-Four Decisions Are Not Inconsistent with the Doctrine of Reasonable Doubt.* The first argument designed to refute the contentions just stated is one based on Thayer's interesting theory of the real nature of the function performed by a court in passing upon the constitutionality of an act passed by a co-ordinate branch of the government. This theory may best be stated in Thayer's own words:⁴¹

"The courts have perceived with more or less distinctness that this exercise of the judicial function does in truth go far beyond the simple business which judges sometimes describe. If their duty were in truth merely and nakedly to ascertain the meaning of the text of the constitution and of the impeached Act of the legislature, and to determine, as an academic question, whether in the court's judgment the two were in conflict, it would to be sure, be an elevated and important office, one dealing with great matters, involving large

⁴⁰ Note 32, *supra*.

⁴¹ THAYER, *LEGAL ESSAYS*, 21-22, 30. "A legislative act is not to be declared void upon a mere conflict of interpretation between the legislative and judicial power. Before proceeding to annul, by judicial sentence, what has been enacted by the lawmaking power, it should clearly appear that the act cannot be supported by any reasonable intendment or allowable presumption." *People v. Supervisors of Orange*, 17 N. Y. 235, 241 (1858).

public considerations, but yet a function far simpler than it really is. Having ascertained all this, yet there remains a question—the really momentous question—whether, after all, the court can disregard the Act. It cannot do this as a mere matter of course—merely because it is concluded that upon a just and true construction the law is unconstitutional. That is precisely the significance of the rule of administration that the courts lay down. It can only disregard the Act when those who have the right to make the laws have not merely made a mistake, but have made a very clear one—so clear that it is not open to rational question. That is the standard of duty to which the courts bring legislative Acts; that is the test which they apply,—not merely their own judgment as to constitutionality, but their conclusion as to what judgment is permissible to another department which the constitution has charged with the duty of making it. This rule recognizes that, having regard to the great, complex, ever-unfolding exigencies of government, much which will seem unconstitutional to one man, or body of men, may reasonably not seem so to another; that the constitution often admits of different interpretations; that there is often a range of choice and judgment; that in such cases the constitution does not impose upon the legislature any one specific opinion, but leaves open this range of choice; and whatever choice is rational is constitutional * * * *the ultimate question is not what is the true meaning of the constitution, but whether legislation is sustainable or not.*" [Writer's italics.]

In short, the courts are not in these cases to decide whether they think a statute is constitutional; they merely decide whether a reasonable man might have thought so. In Thayer's opinion they are performing a function closely similar to that of a court in revising the verdict of a jury,—“the test is whether a reasonable person could, upon the evidence, entertain the jury's opinion.”⁴²

Now if this is true, the significance of a five-to-four decision invalidating a law is entirely altered. It no longer means that the five judges have ignored the reasonable doubts as to the validity of the law which are held by their four colleagues. It merely means that

⁴² Thayer, “Law and Fact in Jury Trials,” 4 HARV. LAW REV. 167, 168; CASES ON CONSTITUTIONAL LAW, I, 672; LEGAL ESSAYS, 20-24.

the majority regard the unconstitutionality of the act as clear beyond reasonable doubt, while the minority consider that some might hold it as doubtful. All nine judges may agree in their own opinions that the act is invalid; they are divided upon the question whether a reasonable person must of necessity reach the same conclusion. They differ, in short, not upon the question whether the legislature was wrong, but upon the question whether the legislature was so palpably and indisputably wrong that no reasonable person could say that it was right.⁴³

The question at once arises whether this somewhat hair-splitting distinction between what a judge thinks and what he thinks a reasonable man might have thought is actually recognized and acted upon by the courts in passing upon the validity of laws. Obviously there can be no authoritative answer to this question since few judges are disposed either to examine or to explain their mental processes with much minuteness. There are instances in which courts have expressed doubts as to the constitutionality of statutes but have still upheld them.⁴⁴ There are also cases in which dissenting justices without placing their own opinions positively on record have maintained that laws ought to be upheld since reasonable men might regard them as valid.⁴⁵ These cases are most likely to occur when the issue of constitutionality before the court is one depending upon some question of degree, such as the limits to which exercises of the

⁴³ After quoting the passage from Baldwin set forth in note 35, *supra*, Willoughby remarks: "This argument is not convincing. Admitting that either the one or the other of the two opinions must be conceded to the dissenting justices, it does not follow that the doctrine of reasonable doubt is shown to be repudiated. The question which the court, as a court, has to decide is as to the existence of this reasonable doubt. There may, of course, be a difference of opinion as to this, but it is still this fact which the court seeks to determine and which controls its decision. It is no more proper to say that the principle is repudiated when the court is not unanimous, than to hold that in passing by a divided court upon a question of contributory negligence, the principle of reasonable doubt is not applied." WILLoughby ON CONSTITUTION, I, 22, note.

⁴⁴ "We must therefore, while admitting the question is not free from doubt, resolve that doubt in favor of the power of the legislature to authorize the expenditures as provided in the act in question." *Denver & R. G. R. Co. v. Grand County*, 51 Utah 294, 303 (1917).

⁴⁵ Mr. Justice Holmes, dissenting in *Lochner v. New York*, 198 U. S. 45 (1905), said: "This case is decided upon an economic theory which a

police power may be pushed without infringing upon the guarantees of the Fourteenth Amendment. But in the by and large one cannot read either the majority or dissenting opinions of the courts upon constitutional questions without being convinced that the average judge decides a case in accordance with his own honest view of the constitutionality of the act involved, and is not worrying about what a hypothetical reasonable man might decide. If a court invalidates a law it is in most cases because a majority of the judges believe the law violates the Constitution; and the judges who dissent from that decision do so because they believe it does not.⁴⁶

Nor should it be overlooked that Thayer's theory does not square with and is not intended to square with Marshall's doctrine in *Marbury v. Madison* as to the basis upon which the court's power to declare an act of Congress unconstitutional must rest. That well known doctrine is, of course, that the Constitution is the supreme law of the land, that it is the essence of judicial duty to determine what the law is and to apply it in concrete cases, that the performance of this duty requires the judges to compare legislative enactments with the Constitution and to refuse to apply as law any statute which is in conflict with the Constitution.⁴⁷ Now there are dis-

large part of this country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. * * * I think the word liberty in the fourteenth amendment, is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law. It does not need research to show that no such sweeping condemnation can be passed upon the statute before us. A reasonable man might think it a proper measure on the score of health. Men whom I certainly could not pronounce unreasonable would uphold it as a first installment of a general regulation of the hours of work."

⁴⁶"If I had entertained doubts of the constitutionality of the law, I must have held the law valid until those doubts became convictions. But as I have a very decided opinion that Congress acted within the scope of its authority, I must hold the law to be constitutional, and dissent from the opinion of the court." Mr. Justice Miller dissenting in *Hepburn v. Griswold*, 8 Wall. 603, 638 (1869).

⁴⁷"It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the law to particular cases, must of

tinguished writers on constitutional law, Thayer amongst them, who severely criticize this doctrine and maintain either directly or by inference that the power of judicial review is more political than judicial in character;⁴⁸ but the fact remains that Marshall's argument in *Marbury v. Madison* is still regarded as the orthodox basis upon which to rest the power of the courts to invalidate laws and would undoubtedly be followed by any judge who felt called upon to justify his exercise of such power. Even a casual examination of Marshall's doctrine, however, shows that it proceeds on the assumption that "the court's duty * * * is the mere and simple office of construing two writings and comparing one with another, as two contracts or two statutes are construed and compared when they are said to conflict; of declaring the true meaning of each, and, if they are opposed to each other, of carrying into effect the constitution as being of superior obligation."⁴⁹ This clearly imposes on the courts the obligation of deciding according to their own best judgment whether the statute does conflict with the constitution. They are not expected to decide whether the legislature could reasonably have concluded that they had power to pass the statute and if so to sustain it even against their own views as to its validity; they are clearly under the duty of passing squarely upon the question whether the statute does or does not violate the constitution. They are comparing two documents in an effort to determine what the law is governing a concrete case. If they do not decide for themselves as a judicial question whether the two documents conflict but try instead to determine whether reasonable men could have harmonized them, then it would seem that they have failed to exercise the essential duty of declaring what the court finds the law to be, and have instead declared what some one else might reasonably have found it

necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty." *Marbury v. Madison*, 1 Cranch 137, 177 (1803).

⁴⁸ THAYER, *LEGAL ESSAYS*, 1; HALL, *CONSTITUTIONAL LAW*, 35; WILLOUGHBY ON *CONSTITUTION*, I, 3.

⁴⁹ THAYER, *op. cit.*, 12.

to be. If it is not part of the solemn duty of the court to enforce its own honestly considered views as to whether the statute conflicts with the constitution, regardless of whether or not reasonable men might disagree, then, under the doctrine of *Marbury v. Madison*, it is hard to see why the court is under any necessity of considering at all the possibility of such a conflict. If it is not under obligation in all cases to give effect to its own views as to the constitutionality of statutes, there seems no logical reason why it should not as a matter of course give effect to all the views of the legislature, just as an English court does. Thus it would appear that it is only on the theory that in passing upon the validity of statutes the courts are exercising a power essentially political in origin and nature that Thayer's doctrine can be logically supported.⁵⁰

There remains for consideration the proposition that the unanimous verdict required in the common law jury system serves as a strong argument from analogy for a unanimous decision of a court declaring a statute unconstitutional. This argument suffers from the weakness common to most arguments resting on analogy, the weakness of allowing certain superficial similarities between the things compared to overshadow fundamental distinctions. It is true that a person accused of crime is presumed to be innocent until proved beyond reasonable doubt to be guilty; and it is also true that a law is presumed to be constitutional until shown beyond reasonable doubt to be unconstitutional. And since the accepted method of proving guilt beyond reasonable doubt is by a unanimous verdict it has been easy to assume that proof of guilt beyond such reasonable doubt could not be established without such unanimity. If proof of guilt beyond reasonable doubt requires unanimity of a jury, then proof of unconstitutionality beyond reasonable doubt must require unanimity on the part of the court. The defect in this argument lies in the assumption that the law presumes that the guilt of an accused person could not be established beyond a reasonable doubt unless the verdict of the jury were unanimous. As a matter of actual fact the unanimity rule and the doctrine of reasonable doubt are separate and distinct elements of the jury system, having no historical nor logical connection with each other. There are, in short, sev-

⁵⁰ It should be noted that Thayer himself does not apply this theory to the problem of five-to-four decisions. It is Professor Willoughby who makes this application as set forth in note 43, *supra*.

eral conspicuous points at which the supposed analogy under consideration breaks down.

It is perfectly plain, in the first place, that historically the requirement of a unanimous verdict was in no way based on the theory that a disagreement would prove the existence of reasonable doubts as to the guilt of the accused. Such disagreement merely showed that there was not evidence enough to convict. The jury was at the outset merely a group of neighbors called in to give evidence regarding the crime. Theoretically they testified as to facts lying within their own knowledge. "To require that twelve men should be unanimous was simply to fix the amount of evidence which the law deemed to be conclusive of a matter in dispute."⁵¹ Of course this early notion of the function of the jury has not survived; but there seems no question but what the modern requirement of unanimity is merely based on the practical necessity of having some definite and certain objective test as to guilt or innocence. This test has been standardized in our law as being met when twelve men chosen for the purpose can agree; it is not met when fewer than twelve agree.⁵² Some other test might have been chosen and in earlier times was chosen, but this happens to be the one which has prevailed.

⁵¹ FORSYTHE, HISTORY OF TRIAL BY JURY, 239.

⁵² "In most modern systems of criminal law, the legislator has felt the necessity of providing some condition which must be fulfilled before the person accused can be punished. In systems founded on the Roman law, this condition has generally been the confession of the accused; and the theory of torture was that, when a man was vehemently suspected, he should be tested, by extreme pain. * * * In our country, the same object is completely and rationally attained by the unanimity of the jurors. Our law contains no rules as to the number of witnesses on whose evidence a man must be convicted. It knows nothing of *plena* or *semiplena probatio*, but it provides that no one shall be considered guilty unless a certain number of average persons *concur* in thinking him so. This concurrence is the gist of the institution. Take it away and the verdict of the jury becomes meaningless." STEPHEN, GENERAL VIEW OF THE CRIMINAL LAW OF ENGLAND, 219-220.

The essential reason for the unanimity rule is stated by Pollock and Maitland: "The parties to the litigation have 'put themselves' upon a certain test. That test is the voice of the country. Just as a corporation can have but one will, so a country can have but one voice—'le pays vint e dyt'. In a later age this communal principle might have led to the acceptance of the majority's verdict. But as yet men had not accepted the dogma that the voice of a majority binds the community. In communal affairs they demanded unanimity; but minorities were expected to give way. Then at this

In the second place, if the failure of a jury to agree is to be regarded as proving the existence of a reasonable doubt as to the guilt of the accused and thereby indicating that the presumption of innocence has not been conclusively overthrown, then the only logical course would be for the jury to acquit the prisoner in the event of such disagreement. Instead of this, ignoring the supposed reasonable doubt lingering in the minds of some of the jurors, the law proceeds to try him over again as though that doubt had never arisen.⁵³ Furthermore, there are jurisdictions in which unanimous verdicts are not required.⁵⁴ In Scotland the unanimity rule has never existed in criminal cases.⁵⁵ And yet no one would be disposed to argue that in such jurisdictions the accused did not enjoy the presumption of innocence until that presumption was rebutted beyond reasonable doubt. These seem fairly conclusive arguments that even at present there is no necessary connection between the doctrine of reasonable doubt and the unanimity rule.

It may be pointed out in addition that there are substantial rea-

point the 'quasi judicial' position of the jurors becomes important. No doubt it would be wrong for a man to acquiesce in a verdict that he knew to be false; but in the common case—and it becomes commoner daily—many of the jurors really have no first-hand knowledge of the facts about which they speak, and there is no harm in a juror's joining in a verdict which expresses the belief of those of his fellows who do know something. Thus a professed unanimity is, as our rolls show, very easily produced. Nor must it escape us that the justices are pursuing a course which puts the verdict of the country on a level with the older modes of proof. If a man came clean from the ordeal or successfully made his law, the due proof would have been given; no one could have questioned the dictum of Omniscience. The verdictum patriae is assimilated to the iudicium Dei. English judges find that a requirement of unanimity is the line of least resistance; it spares them so much trouble." *HISTORY OF ENGLISH LAW*, II, 624.

⁵³ "A jury in a criminal case is told to acquit unless guilt is proved beyond reasonable doubt. That does not mean that if one or more jurors think the prisoner innocent, all should acquit because the difference of opinion shows reasonable doubt. It means that each juror shall be clear in his own mind." Green, *The Judicial Censorship of Legislation*, 47 *AMER. LAW REV.* 90, 98.

⁵⁴ Verdicts by less than a unanimous jury in cases of misdemeanors are authorized by the constitutions of Louisiana, Idaho, Oklahoma, Texas, and Montana. See *INDEX DIGEST OF STATE CONSTITUTIONS*, 810.

"This necessity of a total unanimity seems to be peculiar to our own constitution," *COOLEY'S BLACKSTONE* [4th Ed.], II, 1136.

⁵⁵ *FORSYTH, op. cit.*, 332.

sons based on practical considerations of public policy which justify making it more difficult, by requiring unanimity in the verdict of the jury, to rebut the presumption of innocence than to rebut the presumption of constitutionality attaching to a statute. In the first place, the person accused of crime may be in peril of his life. Until a fairly recent period this was apt to be the case if the prisoner was charged with any kind of felony. The gross brutality of the early criminal law made it a matter of most vital importance that the accused be given the benefit of every possible doubt. He stood on trial facing as his prosecutor the state itself, and mistakes made at his expense might prove fatal. But no such reasons exist for making it quite so difficult to pronounce invalid a legislative enactment. A West Virginia Court puts this distinction very clearly:⁵⁶

"It has been said that it is better that ninety-nine guilty persons should escape than that one innocent person should be condemned. But not so with the question before us. It is not better that the Constitution should be violated ninety and nine times by the legislature than that the courts should erroneously hold one act of the legislature unconstitutional. We cannot raise presumptions in favor of legislative infallibility as strong as those of a jury in favor of the innocence of a prisoner charged with murder."

On the whole, a close scrutiny of the question seems to show that the analogy of the unanimity requirement in the jury system does not afford any support to the view that the doctrine of reasonable doubt is violated by a five-to-four decision declaring a statute void.

It seems to the writer that those who maintain that such a conflict or inconsistency does exist fail to understand correctly what the doctrine of reasonable doubt actually means. The most workable theory in regard to the matter is this: the doctrine of reasonable doubt means that a statute should not be declared unconstitutional so long as a reasonable doubt as to its invalidity remains *in the minds of those to whom is entrusted the power to decide the question of constitutionality*—and under the present rule this means a majority of the court. In other words, so long as the rule exists that five members of the court decide questions for the court, all the doctrine can be reasonably said to mean is that five of the nine

⁵⁶ Varner v. Martin, 21 W. Va. 534, 541 (1883).

members of the Supreme Court must be sure in their minds that a law is invalid.⁵⁷ This being true, the fact that four other judges disagree is entirely irrelevant. A brief examination of this theory will show that it is entirely rational and that it is the theory upon which our courts have uniformly proceeded.

In appraising this theory it is important to keep in mind in the first place that a majority of the Supreme Court judges may firmly believe that a law is invalid beyond all reasonable doubt in spite of the fact that the other four judges believe with equal firmness that the law is valid. While judicially minded men would naturally take due cognizance of opinions contrary to their own it is, of course, ridiculous to assume that five men cannot feel perfectly sure that they are right simply because four men whose opinions they respect disagree with them. Even the most naive observer of human nature realizes that there is hardly anything more futile than arguing with a convinced person. Opposition only tends to strengthen one's convictions that his opinions are correct. The opinions embodying the views of a majority or minority of a divided court are as a rule couched in language far more crisp and uncompromising than those which voice the views of a unanimous bench.⁵⁸

Furthermore, this argument that the majority of a court cannot be sure beyond reasonable doubt that a law is invalid simply because the minority disagrees has the awkward consequence of proving too much. If the conflicting views of their colleagues must of necessity produce this uncertainty of mind in the majority, why should not

⁵⁷ "The rule that a statute to be held void must clearly be bad means that each judge of a majority shall be clear in his own mind. It is supposed to be the duty of a judge to make up his mind for himself and not to let his decision be controlled by the opinion of anybody else. What would be a rank absurdity would be to direct a jury to acquit if they could not agree, and it is a ranker absurdity to suggest that a judge ought to acquiesce in what he believes to be a violation of constitutional right and a denial of justice to the parties before him, because some of his colleagues think differently." Green, *op. cit.*, 47 AMER. LAW REV. 90, 98.

⁵⁸ There was, for instance, no uncertainty of conviction in the mind of Mr. Justice Daniel when he penned the following words in his opinion in the Dred Scott Case: "Scarcely anything more illogical or extravagant can be imagined than the attempt to deduce from this provision in the constitution a power to destroy or in any wise to impair the civil and political rights of the United States. * * *

"There can exist no rational or natural connection of affinity between

the same result be produced by the disagreement of other learned men whose opinions are entitled to respect? The knowledge that Mr. Hughes, Mr. Taft, and Mr. Root after impartial consideration had concluded a law to be constitutional might and probably would be quite as disturbing to the assurance of mind with which a majority of the Supreme Court reached an opposite conclusion as would be opposing views of their own colleagues. Of course the application of any such test of reasonable doubt as this would create a situation in which no law would ever be held invalid because there could always be found some lawyer of distinction to assert that it was valid. It must be concluded that the only sensible construction to place upon the doctrine of reasonable doubt is the one stated above: namely, the majority of the court, being legally empowered to decide the question, should not hold a law unconstitutional if any reasonable doubt as to its invalidity remains in their own minds. The doubts or conflicting views of every one else including their dissenting associates they may ignore.

There is plenty of evidence that this is exactly the interpretation which the courts themselves have placed upon the doctrine of reasonable doubt. Without pretending to have examined the mass of cases in which there have been disagreements amongst judges on questions of constitutionality, the writer in an extended search has found no case in which such a division of opinion has been regarded as evidence that a reasonable doubt existed as to the invalidity of the statute, which doubt must compel the court to uphold the law even when a majority of the judges regarded it as invalid. Courts seem to have proceeded upon the simple assumption that all the doc-

a pretension like this and the power vested by the constitution in Congress with regard to the territories, on the contrary, there is an absolute incongruity between them. * * *

"The injustice and extravagance necessarily implied in a supposition like this, cannot be rationally imputed to the patriotic or the honest, or to those who were merely sane." *Dred Scott v. Sandford*, 19 How. 393, 489 (1856).

Note also the opening words of Mr. Justice McKenna's dissent in the recent Housing Law decision: "The Chief Justice, Mr. Justice Van Devanter, Mr. Justice McReynolds and I dissent from the opinion and judgment of the court. The grounds of dissent are the explicit provisions of the constitution of the United States; the specifications of the grounds are the irresistible deductions from those provisions and, we think, would require no expression but for the opposition of those whose judgments challenge attention." *Block v. Hirsh*, decided April 18, 1921. No. 640, Oct. Term, 1920.

trine requires is that the majority of the court be sure in their own minds that their conclusions are correct. Furthermore, while dissenting justices have criticized, belabored and excoriated their majority colleagues for decisions they regard as wrong, and while they have charged them with violating the doctrine of reasonable doubt, no case has been discovered in which a minority judge has accused the majority of violating that doctrine simply because they ignored the dissenters.

II. EXPEDIENCY OF REQUIRING MORE THAN A BARE MAJORITY OF A COURT TO DECLARE A LAW UNCONSTITUTIONAL.

Having reviewed the so-called "reasonable doubt" argument against five-to-four decisions holding statutes void, it remains to consider whether upon general grounds of expediency and public policy it would be desirable to establish a rule that laws may be invalidated only by a unanimous court or by some extraordinary majority of its members. As was indicated at the beginning of this paper, agitation in favor of such a rule began in 1823 and has continued ever since. Between 1823 and 1830 at least six proposals of this kind were made in Congress,⁵⁹ and two others were made in 1867 and 1869 respectively.⁶⁰ A bill requiring unanimous decisions was introduced by

⁵⁹ These are collected in Warren's valuable articles on Legislative and Judicial attacks on the Supreme Court of the United States, 47 *AMER. LAW REV.* 1, 161. They are as follows: (1) Resolution by Senator Johnson of Kentucky, Dec. 1823, see note 2, *supra*; (2) March 11, 1824, Senator Martin Van Buren reported a bill which, as amended, required the concurrence of seven out of ten judges, each judge writing a separate opinion. This was laid on the table and never acted upon. (3) In 1825 Representative Robert P. Letcher (Va.) introduced a resolution requiring the concurrence of five out of seven judges. Again there was no action. (4) Jan. 26, 1826, the House passed by a vote of 126 to 59, a bill to increase the membership of the court to ten. Van Buren reported the bill in the Senate, where an amendment was moved by Senator Rowan of Kentucky requiring that seven of the ten judges must concur *in all cases*. The amendment and bill were lost. (5) Jan. 22, 1827, Representative Wickliffe of Kentucky introduced a bill to require five out of seven judges to invalidate laws. (6) Jan. 21, 1829, Representative Barbour (later a member of the Supreme Court) as Chairman of the judiciary committee reported a bill similar to that introduced by Wickliffe.

⁶⁰ In 1867, Representative Williams of Pennsylvania introduced a bill requiring unanimous decisions of the court upon constitutional questions,

Senator Bourne in 1911.⁶¹ After nearly every unpopular five-to-four decision there has been more or less comment indicating dissatisfaction with the rule making such decisions possible.

These various proposals and discussions have borne some fruit. Even Marshall felt the need of making some concessions to those who were accusing the Supreme Court of invalidating state laws by a bare majority of a quorum, and in 1834 laid down a rule that the Court would not invalidate a state law unless a majority of a full bench (seven at that time) should concur in the decision.⁶² This rule has prevailed ever since in the United States courts and has been adopted also in the courts of several states.⁶³ In 1912 Ohio adopted a constitutional amendment providing that all but one of the judges of the supreme court of the state must concur in a decision holding a statute unconstitutional unless such decision is in affirmance of the decision of the lower court.⁶⁴ In 1918 the constitution of North

WARREN, *op. cit.*, 188. In 1868, Representative Wilson introduced a bill which required a two-thirds majority of the court to invalidate any act of Congress. This bill passed the House but not the Senate, WARREN, *op. cit.*, 189.

⁶¹ The text of this bill together with Senator Bourne's speech in its defense, is printed as an appendix to Collins' *FOURTEENTH AMENDMENT AND THE STATES*, 184-187.

⁶² "The practice of this court is not (except in cases of absolute necessity) to deliver any judgment in cases where constitutional questions are involved unless four judges concur in opinion, thus making the decision that of a majority of the whole court." *New York v. Miln*, 8 Peters 102, 122 (1834).

Warren points out the practical significance of this rule. "It is interesting to note that if the court had followed the precedent which (it was charged) had been set in 1823, in *Green v. Biddle*, and had delivered its opinion by a mere majority of the judges present, the whole course of American legal history would have been changed; for the constitutional cases then pending were *Charles River Bridge v. Warren Bridge*, *New York v. Miln*, and *Briscoe v. Bank of the Commonwealth of Kentucky*—cases of immense importance, involving the subjects of monopoly, interstate commerce, and State's Rights, all three of which the Supreme Court, under Taney as Chief Justice, in 1837 (after Marshall's death), decided quite contrary to the view held by Marshall in 1834." WARREN, *op. cit.*, 166.

⁶³ Discussed with elaborate citation of cases in 15 *CORPUS JURIS*, 938, 7 *RULING CASE LAW* 1006. For requirements of this kind in state constitutions see *INDEX DIGEST OF STATE CONSTITUTIONS*, 384.

⁶⁴ "No law shall be held unconstitutional and void by the supreme court without the concurrence of at least all but one of the judges, except in the affirmance of a judgment of the court of appeals declaring a law unconstitutional and void." *CONSTITUTION OF OHIO*, Art. IV, Sec. 2.

Dakota was so amended as to require the concurrence of four of the five judges of the supreme court to declare any statute invalid.⁶⁵ A constitutional amendment somewhat similar to this was submitted to the people of Minnesota for ratification in 1914 but was not adopted.⁶⁶ Several proposals of the same general nature were discussed at length in the Massachusetts Constitutional Convention in 1918, but did not secure the support of that body.⁶⁷ This whole problem was presented clearly to the Illinois Constitutional Convention, which at the time of writing has not yet completed its work, in the reports prepared for the use of that body by the Legislative Reference Bureau of that state.⁶⁸ So that on the whole there seems to be at the present time evidence of some demand for the sort of restriction under consideration.

1. *Arguments in Favor of the Restriction.* Now what are the principal arguments upon which the demand for the unanimity rule, or some approach to it, rests? In the first place, it is urged that to

⁶⁵ "The Supreme Court shall consist of five judges, a majority of whom shall be necessary to form a quorum or pronounce a decision, * * * provided, however, that in no case shall any legislative enactment or law of the State of North Dakota be declared unconstitutional unless at least four of the judges shall so decide." CONSTITUTION OF NORTH DAKOTA, Sec. 89.

⁶⁶ "The Supreme court shall consist of one chief justice and six associate justices. Five shall constitute a quorum, and the concurrence of at least four shall be necessary to a decision, but no statute shall be declared unconstitutional unless five members of the court shall concur in the decision." Proposed amendment to Constitution of Minn. Art. 6, Sec. 2, Laws of 1913, 893.

⁶⁷ There were three such proposals. One required a unanimous bench to invalidate a statute, one the concurrence of all but one judge, and one the concurrence of two-thirds of the court. DEBATES IN MASS. CONSTITUTIONAL CONVENTION, 1917-1918, I, 453. For elaborate discussion of these proposals see *ibid.*, 454-541.

⁶⁸ See Bulletin No. 10 on The Judicial Department, etc., 857-861. See also Report upon Judicial Control over Legislatures as to Constitutional Questions prepared by Jackson H. Ralston for and at the request of the American Federation of Labor in 1919. Among the proposals therein contained (p. 62) is the following: "That the Supreme Court of the United States, in the exercise of its jurisdiction to declare an act of the state legislature or of any state or Federal agency including the judiciary, to be unconstitutional, shall only do so by the acquiescence of considerably more than a bare majority of its members; that, for instance, three-fourths of the entire membership of the court should concur to such end, and the like requirement shall hold as to the highest courts of the states."

allow the Supreme Court to declare laws unconstitutional by a decision of five to four is to place undue power in the hands of one man.⁶⁹ It is this one judge who renders the decision of the court and who actually invalidates the law. He alone can overrule both houses of Congress, the President, and all the lower courts. This one judge, urge the critics, ought not to exercise such stupendous power, nor ought any one man to be asked to assume such enormous responsibility. Such a concentration of authority is incompatible with any notion of a legislative branch of government endowed with coordinate powers.

In the second place, it is contended that such a rule as that under discussion would operate as a substantial check upon the exercise by the courts of the power to invalidate laws. Fewer statutes would be declared unconstitutional, and this on the whole would be a good thing. Especially would such a result be desirable in the field of police legislation, where under the present system many laws are held void by closely divided courts largely because the judges disagree with the legislature upon broad questions of social and economic policy. Here at least it would be a good thing to make it substantially more difficult to overrule the legislature. This whole argument proceeds upon the assumption either that the power of judicial review ought not to be enjoyed at all by the courts or that it ought to be exercised much less frequently. It has been true in general that those who have been active in furthering the adoption of the unanimity rule, or some approach to it, in respect to court decisions have been those who have felt that the courts have usurped the power to pass upon the constitutionality of statutes and have sought either to abolish it or to render it virtually ineffective. It does not necessarily follow, however, that a belief in the desirability of the rule under consideration is incompatible with a staunch advocacy of the doctrine of judicial review of legislation.

⁶⁹ This point was emphasized by Mr. Bryan in his famous "Cross of Gold" Speech in the Democratic National Convention of 1896. He said: "They say that we passed an unconstitutional law; we deny it. The income tax law was not unconstitutional when it was passed; it was not unconstitutional when it went before the Supreme Court for the first time; it did not become unconstitutional until one of the judges changed his mind, and we cannot be expected to know when a judge will change his mind." *SPEECHES OF WM. JENNINGS BRYAN*, I, 242.

The third and most substantial argument in favor of this restriction on the court is that it would increase popular confidence in the court and stimulate new respect for its decisions upon constitutional questions. With such a rule in force laws could still be held unconstitutional but upon such occasions the court would present a more united front. It is natural for people to feel, and there is not the slightest question that many people do feel, that a five-to-four decision is not a permanent or satisfactory disposition of a constitutional question. The margin is too close. There is more than a fighting chance that the decision may be reversed or modified. Every decision invalidating a statute by a five-to-four vote is played up in the press and in the weekly journals. The very fact that the judges are almost evenly divided makes the decision better "copy" from the journalistic standpoint. The result is that the man in the street is very apt to acquire gradually the impression that the time of the Supreme Court is chiefly occupied in invalidating what he regards as useful legislation and that this nefarious work is almost invariably accomplished by a five-to-four decision. That this impression is based upon almost complete ignorance of the facts is irrelevant since there is **not the slightest hope that the man** in the street will ever be made to understand clearly or accurately how the Supreme Court works or what it actually does. The important thing is that these five-to-four decisions stick in the minds of the average citizen and contribute to the all too prevalent distrust and dislike of our highest tribunal. If the unanimity rule were adopted or a rule requiring some special majority of the court to declare a law void, even if some inconvenience were attached to the change, the result in the direction of restoring and inspiring public confidence in the Supreme Court would be well worth the cost.

2. *Arguments against the Restriction.* Turning to the arguments against this proposal one is met by the contention at the outset that the practice of declaring laws void by five-to-four decisions does not place any more power in the hands of a single judge than any other system. There must always be some specific number necessary to render a decision and it must, therefore, always be the possibility, in a marginal decision, that if some one judge had decided differently the results would have been different. Just as it takes only one man to "hang" a jury, so it would take but one judge, if unanimity were required, to prevent a court from declaring a law uncon-

stitutional.⁷⁰ The difference between the present practice and that which is being proposed is not that the "marginal" judge exercises any more or any different power in one case than in the other, but merely that he is rendered more conspicuous by the existing rule.

It is argued in the second place that the courts do not at present exercise their power to invalidate laws too frequently or without sufficient cause and that no restriction of the kind proposed is necessary as a check upon the abuse of this power. It is here pointed out that the Supreme Court of the United States in its entire history has invalidated not more than forty statutes passed by Congress and not more than three hundred state statutes or constitutional provisions.⁷¹ It is further urged that of the forty odd cases holding acts of Congress void nearly half were decided without any dissents and only five were decided by a bare majority of the court. In the face of these statistics it seems futile to argue that five-to-four decisions are so frequent as to cause a reasonable complaint. To set up an arbitrary barrier making it more difficult to declare laws void would increase the danger from irresponsible legislation and lessen the protection now enjoyed by the citizen in respect to his constitutional rights. Even in the controversial field of the police power the courts are at present adopting a sufficiently liberal viewpoint and ought not to be hindered in the performance of their important function of curbing legislative excesses.

It is also pointed out that there is nothing in the experience of Ohio or North Dakota under the rules prevailing in those states⁷² to indicate that anything substantial has been accomplished by requiring an extraordinary majority of the supreme court to concur in declaring a law void. The Ohio rule has been in effect about eight years and the North Dakota rule two years. In each state one case has been decided in which this new rule has been called into opera-

⁷⁰ Under a rule requiring unanimity the presence on the bench of a single judge who did not believe the courts ought to exercise the power of judicial review under any circumstances could prevent any law from being invalidated irrespective of the merits of the constitutional question. See PROCEEDINGS AND DEBATES, CONSTITUTIONAL CONVENTION OF OHIO, 1912, I, 1029.

⁷¹ These figures are only approximate. They are based upon the statistical data in Blaine Moore's *THE SUPREME COURT AND UNCONSTITUTIONAL LEGISLATION*, Columbia University, Studies in Economics, History and Public Law, Vol. 54, No. 2.

⁷² *Supra*, p. 796.

tion.⁷³ While it is still too early to pass any conclusive judgment upon the actual working of the rule, it is submitted that the facts already disclosed do not indicate that the new restrictions are likely to accomplish anything important in the way of results.

Finally it is contended that the establishment of the proposed rule would have no appreciable effect in strengthening or stimulating popular confidence in or respect for the courts. The underlying thesis of the argument that such a result would take place is, in reality, nothing more than the perfectly obvious proposition that the people in general would regard unanimous decisions with more respect than those made by a divided court. This may, indeed, constitute an argument in favor of abolishing the practise of writing dissenting opinions or recording dissents, all of which is a very debatable issue, but it has no special bearing upon the rule under discussion. This rule does not and can not make the court unanimous in its decisions; nothing can do that; it merely brings about a different result when they are not unanimous. There would still be dissenting opinions and there would still be cases in which the majority of the judges disagreed with the others upon the question of the constitutionality of statutes. The only difference would be in respect to the power of those judges to bring about certain legal consequences. And so far as the influence on the popular mind is concerned, it may seriously be questioned which is most calculated to inspire distrust of the Supreme Court,—a decision invalidating a statute by a vote of five to four or a decision upholding a statute rendered by a court of nine, eight of whom believe the statute to be null and void.⁷⁴

It is apparent from the foregoing analysis that here, as in regard to most questions of expediency, the opinions of intelligent people

⁷³ *Barker v. City of Akron*, 98 Ohio St. 446 (1918); *Daly v. Beery*, 178 N. W. 104 (1920).

⁷⁴ See also further suggestions made in the bulletin of the Illinois Legislative Reference Bureau, *op. cit.* 861. "Requiring a certain proportion of judges to declare a law unconstitutional may well lead to a liberal interpretation in one case, which makes a stronger popular or sentimental appeal, as against a strict interpretation in another case. * * * Not only this but an element of greater uncertainty will be added when it is known that a majority of a court favored a particular interpretation, but was prevented from adopting that interpretation by a constitutional provision of this character. A change in judicial attitude or a change in the membership of a court would be more likely under such conditions to result in a change of the decisions."

differ widely. One cannot declare dogmatically that a unanimity rule in respect to Supreme Court decisions ought or ought not to be adopted. The study which the writer has devoted to the problem, however, has not convinced him that the adoption of such a rule would produce beneficial results of any substantial importance. The popular demand for such a requirement comes from a more or less widespread dissatisfaction with court decisions invalidating laws regarded by the layman as useful and desirable. These are in the main laws passed in the exercise of the police power and relate to labor conditions, public health and morals. The constitutional issues involved have been mixed questions of law and fact and the courts have in some cases shown themselves unfamiliar with the social and economic data upon which their decisions must be predicated. It seems to the writer that the most rational remedy for this situation is to establish such changes in the methods of trying cases involving the validity of social and economic legislation as would assure the court full access to all the data necessary for a reasonable and balanced judgment upon the merits of each case. Some such plans of this nature as those suggested by Professor Freund⁷⁵ and Professor Kales⁷⁶ would be more likely to correct such undesirable tendencies as may exist in the judicial review of legislation than would an arbitrary requirement of a unanimous decision. In other words it would be more desirable to establish rules of procedure which would make it easier for the court to reach a correct

⁷⁵ Freund's suggestion is the establishment of a rule based upon the analogy of the appellate review of judicial decisions of fact. "It would mean that there must have been evidence of facts within the reach of the legislature sufficient to support its judgment that an exigency existed for its interference [in the exercise of the police power]. "Constitutional Limitations and Labor Legislation," 4 ILL. LAW REVIEW. 623.

⁷⁶ "The only way to meet the skepticism of the court * * * is to build up a record of evidence in the trial court, by witnesses produced for cross examination—witnesses who will testify to the facts and opinions upon which a justification may be based, and will establish their conclusions as to those which, if not already generally accepted, are nevertheless certain to be accepted. Such a method of putting in a case challenges the opponents to produce evidence on their side. If they fail to do so the basis is laid for the contention in the Supreme Court that they must take the consequences of their default, and that the court cannot, in the face of full and uncontroverted proofs, ignore in the particular case before it facts and data which, if true, show a justification for the legislation in question. "New Methods in Due-Process Cases," 12 AMER. POLITICAL SCIENCE REV. 249.

decision upon these difficult questions than to prevent the court from giving effect to the judgment of a majority of its members in certain cases regardless of what that judgment may be. The unanimity rule impresses the writer as a flank movement upon a problem which might better be attacked in the front.

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